

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY O. WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

January 24, 2003

No. 235917

Wayne Circuit Court

LC No. 00-013251-01

Before: Cooper, P.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of criminal sexual conduct in the third degree (CSC III), MCL 750.520d, entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was originally charged with two counts of CSC III in connection with an assault on complainant, a twenty-year-old special education student and the daughter of his estranged wife. Complainant testified that on August 5, 2000, she was washing dishes when defendant approached her and engaged in anal intercourse with her. She stated that she asked defendant to stop, but that he refused. Defendant stopped when someone knocked on the door, and told her to not tell anyone what had happened. Complainant indicated that defendant engaged in anal and vaginal penetration with her on various occasions. She denied that she owed defendant money or that she was angry with him, but admitted that she did not like the way that he treated her mother. Complainant stated that, on one occasion, she was talking to her friend Monica Pritchett on the telephone when defendant began engaging in anal intercourse with her, and that she related the incident to Monica. Complainant's mother testified that when complainant told her about the incident with defendant, she did not believe complainant.

The parties waived the testimony of several endorsed witnesses, including Monica Pritchett, and stipulated to the admission of medical records that indicated that an examination of complainant revealed no physical evidence of a sexual assault. The court held a sidebar conference, and indicated it wished to hear the testimony of Monica Pritchett. Pritchett, a twenty-one year-old special education student, testified that on August 5, 2000, complainant told her over the telephone that defendant was kissing her. Pritchett later stated that complainant told her that defendant was having sexual intercourse with her. She admitted that she told the police that complainant said only that defendant was kissing her.

During closing argument defense counsel asserted that complainant's testimony was not credible, and that complainant's dislike for defendant gave her a reason to fabricate her allegations. In addition, counsel emphasized that no physical evidence existed to corroborate complainant's allegations. In rebuttal closing argument the prosecutor noted that defense counsel emphasized the lack of physical evidence to corroborate complainant's allegations. The prosecutor remarked that physical evidence was not present in many sexual assault cases.

The trial court found defendant guilty of one count of CSC III involving anal penetration for the incident that occurred on August 5, 2000, and acquitted him of one count of CSC III involving vaginal penetration. The court noted that while no physical evidence corroborated complainant's testimony, no such evidence was required. The court found that complainant's testimony regarding the events of August 5, 2000, was credible.

Defendant moved for a new trial, arguing that he was denied due process and a fair trial both by the trial court's direction to the prosecution to call Monica Pritchett as a witness and the court's subsequent reliance on that testimony, and by the prosecutor's argument that physical evidence was not present in many sexual assault cases. The trial court denied the motion. The court indicated that it was aware that counsel's arguments were not evidence, and that it did not believe that it relied on the prosecutor's remark. Furthermore, the court noted that the rules of evidence specifically allowed a court to call witnesses and to question those witnesses.

A person is guilty of CSC III if he engages in sexual penetration with another person under various circumstances, including if the penetration is accomplished by force or coercion or if he knows that the victim is mentally incapacitated or physically helpless. MCL 750.520d. "Sexual penetration" includes any "intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL 750.520a(o).

A trial court may on its own motion call and question witnesses. MRE 614. The decision to call a witness is within the discretion of the trial court. See, e.g., *People v Betts*, 155 Mich App 478, 480-481; 400 NW2d 650 (1986).

Defendant argues that he was denied due process when the trial court directed the prosecution to call Monica Pritchett. He contends that rather than merely acting to clarify existing testimony, the trial court assumed the role of prosecutor and assisted the prosecution in filling in gaps in its case. We disagree. A trial court may sua sponte call and examine a witness who was named as a res gestae witness but whose testimony was waived by the parties. MRE 614; *Betts*, *supra*. The instant case is distinguishable from the cases relied on by defendant, including *United States v Karnes*, 531 F2d 214, 217 (CA 4, 1976), in which reversal was required because the trial court did not instruct the jury that two crucial witnesses called by the court and without whom the prosecution could not have proven its case were to be afforded no greater credibility than other witnesses, and *People v Cofield*, 9 Ill App 3d 1048, 1050; 293 NE2d 692 (1973), in which reversal was required because the trial court called several witnesses and intimidated the young complainant. Here, the trial court asked Pritchett only two questions, her age and her grade in school. Pritchett's testimony was not crucial to the prosecution's case, and was in fact contradictory in various respects.

In making its findings of fact and conclusions of law the trial court referred to Pritchett's testimony, but did not indicate that it based its finding of guilt on that testimony. The trial court

specifically stated that it found complainant's testimony regarding the incident on August 5, 2000, to be credible. Complainant's testimony, which did not require corroboration, MCL 750.520h, established the elements of CSC III. MCL 750.520d, 750.520a(1). The trial court did not abuse its discretion by directing the prosecution to call Pritchett, *Betts*, *supra*, and defendant was not denied due process.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis. *Id.* The reviewing court must examine the pertinent portion of the record, and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

Defendant argues that the prosecutor denied him due process and a fair trial by arguing facts not in evidence concerning the lack of physical evidence in many sexual assault cases. We disagree. A prosecutor may not make a statement of fact that is unsupported by evidence in the case. *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). The prosecutor's statement that physical evidence is not present in many sexual assault cases was not supported by evidence, but was made in response to defense counsel's argument that complainant's allegations were not corroborated by any physical evidence. *Schutte*, *supra*. Moreover, a judge sitting as the factfinder is presumed to understand the law and to decide a case based solely on properly admitted evidence. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001). In denying defendant's motion for new trial, the trial court confirmed that it recognized that the prosecutor's remark was not evidence, and that the remark did not influence its decision. Defendant was not prejudiced by the prosecutor's remark. Reversal is not required. MCL 769.26.

We affirm.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Michael J. Talbot